No. 2591

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SMITH-POWERS LOGGING COMPANY, A Corporation, and C. A. SMITH LUMBER & MANUFACTURING COMPANY,

Appellants.

vs.

E. W. BERNITT and VICTOR WITTICK,

Appellees.

Appeal from the District Court of the United States, for the District of Oregon

---

BRIEF OF APPELLEES.

W. U. DOUGLAS,
Marshfield, Oregon.

JOHN F. HALL,
Marshfield, Oregon.
Solicitors for Appellees.

IN THE

United States Circuit Court of Appeals

Ninth District

SMITH-POWERS LOGGING COMPANY, A Corporation, and C. A. SMITH LUMBER & MANUFACTURING COMPANY,

Appellants.

vs.

E. W. BERNITT and VICTOR WITTICK,

Appellees.

Appeal from the District Court of the United States, for the District of Oregon

---

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

This is a suit in equity between tenants in common for an accounting and a judgment for such amount as the Court shall find due appellees from appellants or either of them, and also asking for a sale of the common property and such other relief as to the Court shall seem meet and equitable. Appellees claim the facts in this case are:

That in 1881 E. B. Dean, David Wilcox and C. H. Merchant were carrying on and conducting a saw mill business upon Coos Bay, in Oregon, under the firm name of E. B. Dean & Co.; that they desired to make certain arrangements with men carrying on rafting business so that the logs for their saw mills coming down on the waters of the various tributaries of Coos Bay could be properly and economically handled; that George Wulff and David Young were in the business of rafting logs, and William Klahn and E. W. Bernitt were also in the same business; that pursuant to this idea C. H. Merchant, one of the partners, induced George Wulff and David Young to contribute to the construction of certain log booms, in the complaint described, for the catching of these saw logs and timber; that the land for the most part upon which these

booms were constructed belonged to the partnership of E. B. Dean & Co.; that C. H. Merchant also tried to induce William Klahn and E. W. Bernitt to go into the business with them, but at first they hesitated and E. B. Dean and Co. together with George Wulff and David Young commenced the construction of what is described in the testimony as the Upper Boom; that before said Upper Boom was completed, however, William Klahn and E. W. Bernitt consented and did go in and became interested in the enterprise; that E. B. Dean & Co. was to, and did, furnish the land and one-half of the cost of building the booms, and the other parties were to, and did, pay for half of the construction of the booms and were to, and did, operate and take care of them; that E. B Dean & Co. was to, and did, pay 25 cents per thousand feet board measure, for saw logs and 1-8th of a cent per lineal foot for piles, for its own timber caught and handled through the boom, and the boom was also used to catch the saw logs and timber of other parties at the same price.

That the following method of handling the business was adopted: The logs and timber caught in the boom for Dean & Company were credited to a Boom Account kept by E. B. Dean & Co. on its books, and the cost of keeping up the

boom, such as labor and material for repairing it was charged to this account. Ordinarily at the end of each rafting season a balance would be struck and if the upkeep of the boom had not consumed the entire earnings of the boom for logs caught belonging to E. B. Dean & Co. the difference was divided among these parties, one-half was retained by E. B. Dean & Company and one-half was placed to the credit of the rafters on their individual accounts on the books of E. B. Dean & Co. If the earnings of the boom from the logs and timber caught for E. B. Dean & Co. were not sufficient to pay for the upkeep of the boom, the deficiency was charged, one-half to E. B. Dean & Co. and one-half to the rafters, who at the beginning of the agreement were George Wulff, David Young, William Klahn and E. W. Bernitt; that the earnings of the boom from other logs and timber caught there in for outside parties were divided, E. B. Dean & Co. taking one-half and the rafters taking the other half, divided in proportion to their respective portions. This was the original arrangement, and it continued through the various chains of ownership down to some time in the year 1909.

In the meantime the partnership of E. B. Dean and Co. had been dissolved by

agreement and death, and the Dean Lumber Company succeeded to the interests of the partnership, and thereafter C. A. Smith succeeded to the interests of the Dean Lumber Company, and thereafter the Smith-Powers Logging Company became the successor of C. A. Smith.

On the other hand the rafters George Wulff and David Young retired from the rafting business and their interest in the boom was finally acquired by the appellee Victor Wittick, after many transfers. The rafter William Klahn assigned his interest to the appellee E. W. Bernitt, and the said E. W. Bernitt is the only one of the original parties now remaining.

During all these changes of ownership of the lands, and transfers of the boom privileges between the rafters, the original agreement was recognized, carried out and worked under until some time in June 1909, long after Smith-Powers Logging Co. claim to have acquired its interest in the booms, when it took exclusive possession of them and prevented the appellees from using the same or any portion thereof afterwards. In addition to the first or original boom another boom was built and various improvements were made upon the land during the time of the ownership of E. B. Dean & Co., and in its immediate vicinity, for

facilitating the handling of the boom business. By reason of this appellees had an irrevocable license, easement and right to use the booms, with a joint interest in the improvements upon the lands.

In addition to the right to catch the logs in the boom and charge a certain stipulated price therefor, the rafters had the additional privilege of rafting all the logs so caught, to their destinations from the booms, viz: the different saw mills situated upon Coos Bay, and for this service a charge of 35 cents a thousand (board measure) for logs, and a half cent per lineal foot for piling was imposed by them during all those years. The interest in the boom represented by E. B. Dean & Co. and its successors did not participate in any manner in the charge for the rafting.

In addition to the property rights claimed by the appellees in the boom, they sought to recover boomage for a large number of logs and piles, caught in the booms and rafted during the flood season of 1908 and 1909 beginning with the fall of 1908, claiming that the Smith-Powers Logging Co. and the C. A. Smith Lumber & Manufacturing Co. prevented them from collecting their portion of the amount chargeable therefor. Also that the Smith-Powers Logging Co. has col-

lected and retained a large amount of money for their services in rafting and refused to acknowledge any claim of appellees to it.

The Court held with appellees on the question of ownership in the booms and allowed them therefor $1000.00, and on the question of boomage for logs caught in the boom and rafted by appellees the sum of $2667.34, or a total judgment of $3667.34.

In the Court's opinion, however, it found among other items entering into the amount owing appellees for rafting and boomage that there was due them the sum of $1544.00 collected by Smith-Powers Logging Co. from the Simpson Lumber Co., and that the Smith-Powers Logging Co. had paid to the Simpson Lumber Co. the sum of $600.00 for appellees, but in entering its decree only deducted from the $1544.03 the sum of $295.30. Therefore, to correct the record appellees filed a remittitur (page 92 transcript) in the sum of $304.70, and thereby the appellant has had full credit for said $600.00, so that the decree now stands for $3362.64.

The pleadings allege and admit the incorporation of the various corporation defendants.

The pleadings also allege and admit

the partnership of E. B. Dean, David Wilcox and C. H. Merchant.

The answer admits the ownership of the land upon which the booms are situated to be as in the complaint stated and now in appellant Smith-Powers Logging Co.

The complaint in substance alleges that the appellees and their predecessors did enter into the possession of the land at the solicitation and request of E. B. Dean & Co. and contributed jointly with them in defraying the cost of the construction of the booms thereon to the extent of one-half. The answer does not deny this, but alleges E. B. Dean & Co. erected the booms, and admits that appellees or their predecessors did assist in the erection of the booms, and did go into the possession of them.

The complaint alleges that under the agreement the appellees' predecessors were to do all the rafting of the logs and timber from the boom, and that they were to attend to the catching of all the logs and timbers therein. The answer denies this agreement yet it admits that they and their predecessors did this work for many years.

There is no controversy in the pleadings as to the amount that was charged for boomage or how it was divided only

in the manner of stating it. It is alleged by the complaint and admitted by the answer that it was 25 cents per thousand feet for logs and 1-8th of one cent per lineal foot for piles, for boomage, and 35 cents per thousand, board measure, for logs, and ½ cent per lineal foot for rafting.

The complaint alleges the various changes of ownership of the land whereby it was acquired by Dean Lumber Co. from E. B. Dean & Co. and then by C. A. Smith and Smith-Powers Logging Co., and this is admitted by the answer.

The appellees have alleged the taking of exclusive possession and control of said booms by the Smith-Powers Logging Co. and that is admitted by the answer.

The pleadings, however, put in issue the question of the terms of the original agreement as alleged in the complaint. To prove this agreement the appellees have introduced the testimony of E. W. Bernitt (see pages 138 and 139 of transcript, and at other places in the testimony of said witness), and of George Wulff (see pages 135 and 138 of transcript), which is in effect that E. B. Dean & Co. through one of the members of the firm, C. H. Merchant, induced George Wulff and David Young to enter into an agreement for the construction of one of the

log booms, the Upper Boom, upon a portion of the land described in the complaint, for the purpose of engaging in the business of booming logs and timber therein. The understanding being that E. B. Dean & Co. was to furnish the land and pay one-half of the cost of the construction of the boom, and said Wulff and Young the other half, and each was to have a half interest therein. That they began the construction of the boom and had it nearly completed, when said C. H. Merchant, with the consent of all the other parties, induced William Klahn and E. W. Bernitt to take a quarter interest between them, this interest being a half of the interest of Wulff and Young. Thereupon the private account of Wulff and Young upon the books of E. B. Dean & Co. was credited with $750, and the account of Klahn and Bernitt was charged with $750.00 in payment for the quarter interest.

That afterwards a lower boom was constructed and certain extensions and improvements made, toward the payment of which they all contributed in accordance to their proportionate interest under the original agreement.

In addition to this, the account books of the partnership of E. B. Dean & Co. for the year 1881 and several succeeding

years were introduced and marked Exhibits 1, 2, 3, 4, 5, 6, 7, being identified by the witness W. T. Merchant, John C. Merchant also identifying said exhibits 6 and 7, also exhibits 18, 19, 20, 21, 22 and 23 being identified by W. T. Merchant. Both of these witnesses are sons of the said C. H. Merchant, a partner in the firm of E. B. Dean & Co., and testify that some of the entries made therein are in the handwriting of their father, which they know and recognize.

Exhibits 1 to 7 corroborate this oral testimony concerning the construction of the first or Upper Boom and the interests claimed by appellees. Exhibit 1 is the ledger of E. B. Dean & Co. from January 1879 to December 21st 1881. Upon page 272 thereof is the Coos River Boom account and it shows that against this account there were charges in the total sum of $2364.65. The first item is $30.70 and at page 197 of Exhibit No. 2 one item is "Sundries, $24.70," the other "Spikes, $6.00," making a total of $30.70. By referring to Exhibit No. 3 at page 310 we find that this item of sundries consisted of 3100 feet of three-inch planking, $21.70, and 1000 feet of refuse, $3.00, making the total of $24.70. The next item charged in that account upon said ledger is $182.31. By referring to page 225 of

Exhibit No. 2 we find that this consists of a lot of miscellaneous items covering rope, planking, staples, chains, spikes and other merchandise such as would naturally be used in the construction of the boom.

The next item on the ledger account charged, we find is $2143.62. By referring to page 267 of Exhibit No. 2 we find that $17.40 of this item was for staples, rope and planking and that $2126.22 is for Sundries, and by referring to page 468 of Exhibit No. 3 we find that these sundries consist of boom-sticks, staples, piling and chain, amounting to $922.22, $1194.00 for driving 289 piles at $3.00 apiece, and also four days labor at $10.00 or a total of $1204.00, the two amounts making the total of $2126.22 sundries.

The next item of charge upon this ledger account we find is "Sundries, $7.42," which item may be explained by referring to page 565 or page 322 of Exhibit No. 3, and is evidently for merchandise. On the credit side of this account in the ledger we find entries which will explain the manner in which or by whom these charges against the Coos River boom were paid. The first item of credit is for the return of some planking amounting to $50.10. By referring to page 322 of the Journal (Exhibit No. 2) we find a credit

by Sundries of $356.59, and by referring to pages 564, 565 and 566 we see they were charges against the individual accounts of Wulff and Young, but in reality are credits upon the Boom Account in their favor in that sum. The last item of credit upon that account is a balance of $1937.36; this balance is carried forward to the Ledger marked Exhibit No. 5 at page 18 thereof, and is charged against said boom account, together with other items of expense amounting in all to $89.86, making a total of $2047.22, which charge is balanced by credit, first to Mill Account, of $256.15, which is explained by Journal entry at page 322 and the entry in the Day-book (Exhibit No. 3) as page 564, and by a further credit of $1,-791.07 by Sundries, and we find by referring to page 659 of Exhibit No. 3 that the Mill Account is charged with $895.53 and Young and Wulff with $895.53. Therefore, taken in connection with all the testimony it shows that this boom was built some time in the years 1881 and 1882, and that it was paid for partly by its earnings in catching logs and that the difference between its earnings and the cost was shared by the original parties, E. B. Dean & Co. one-half, and Young and Wulff one-half.

By examining Exhibit No. 4, at page

80, which account evidently covers the earnings of the boom subsequent to and perhaps during its construction, we find that the boom account is charged with $302.69, one-half of the balance, and Young and Wulff credited with one-fourth of the balance, $151.35 and Klahn and Bernitt are credited with one-fourth of the balance, $151.35. We also find that Klahn and Bernitt are charged with $750.00 for one-fourth of the boom, and that Young and Wulff are credited with that amount, and by referring to page 163 of Exhibit No. 5, Bernitt and Klahn's account, we find that they are charged with $750.00. Mr. Bernitt's testimony, beginning at pages 138 and 139 of transcript explains that E. B. Dean & Co. and Young and Wulff built the Upper Boom, or had it nearly completed when he and Klahn took their quarter interest in it, and he and Klahn helped catch the first logs caught in that boom, and also helped deliver them, and at that time the boom was hardly completed, and were charged $750.00 for their interest in the Upper Boom. Subsequently about the year 1883 or 1884, he purchased William Klahn's interest. The witness identified a writing purporting to be a bill of sale made by William Klahn to him, E. W. Bernitt, which writing was introduced

in evidence and marked Plaintiffs' Exhibit No. 8. He also corroborated the books in his testimony by stating that a part of the earnings of the Upper Boom were turned in and were used in payment for a part of the cost of construction.

The Lower Boom was built subsequent to the Upper Boom, and no exact date is fixed for its commencement or completion. Bernitt says (at pages 141 and 151 Trans), that they were three or four years building it; that Mr. Wulff, Dean & Company and he paid for it; that he thinks it was begun, or part of it was built while Mr. Klahn was a partner, but it was not charged up on the books of the Boom Account until after Klahn had sold out. By referring to Exhibit No. 8, the Bill of Sale for Klahn's interest to Bernitt, we find this is dated September 27th, 1884. The natural conclusion therefore is that while some of the work might have been done or begun in 1884 it was not completed for several years afterwards. Again (at pages 167-168 of Trans.) Bernitt says, in effect, answering the question as to whether the boom was built in 1882, 1883 or 1884, that they spent about $4500.00 on it the first two years and continued to build on to it for several years afterwards. Mr. Wulff says (at page 135 Trans.) that it was

built two, three or four years after the Upper Boom. The testimony of both of these parties is to the effect that they, the raftsmen, paid for one-half of this Lower Boom. Mr. Wulff, however, the testimony shows, is a very old man, about seventy-four years of age, and has not thought of this matter for many years, and in fact his partner during this time was the chief business head of his rafting concern, that is Wulff and Young.

By referring to the books we find in Exhibit 6 at page 111 there are certain credits to the Coos River Boom account which are partially explained by the witness John C. Merchant. By referring to Exhibit 7 at page 517 there appears a credit of the total sum of $1402.10, one-quarter of which is charged to Wulff, and one-quarter of which is charged to Bernitt. This apparently was some time about the year 1885, and the witness W. T. Merchant (at page 128 Trans.) in referring to the Coos River Boom account, as shown on Page 111 of Exhibit 6, says that this account evidently covers both booms for the years 1885, 1886 and 1887. and attempts to segregate the items of general expense from the construction account and enumerates the items there appearing going into the construction account of the Lower Boom, which has the

apparent total of $1038.07. While these amounts given by the witnesses in explaining the book entries are more or less disconnected and may be somewhat indefinite, yet they at least corroborate the claim of these appellees as to who built the booms or who paid the money that went into their construction. It must be assumed therefore that both of these booms were constructed by the appellants and the appellees' predecessors jointly.

So far as the ownership or the legal title to the land itself, these appellees make no claim except as to the easement, the right, privilege or license granted to them to use them for operating these particular logging booms thereon. The answer of the appellant Smith-Powers Logging Company admits the ownership of the legal title of these lands.

The testimony and the record thus far outlines and establishes the fact that there was a partnership or at least joint ownership of these booms in the beginning, and this testimony has in no manner been controverted by appellants.

There is no written evidence, except the books of E. B. Dean & Company, that Dean & Company or the partners constituting that firm ever assigned any interest in the land to the appellees or

their predecessors; but these books are the books of account of E. B. Dean & Company covering the period in which the booms were constructed, and the time this original agreement is first claimed to have been entered into. They have been identified by witnesses W. T. Merchant and John C. Merchant, sons of one of the members of the partnership of E. B. Dean & Company, the member of that firm who made the agreement with Young and Wulff and Klahn and Bernitt originally. Their association with the business was more or less intimate as long as their father was connected with it, and even afterwards they had access to these books and knew that they were the account books used during these years. (See testimony of W. T. Merchant and John C. Merchant generally).

In regard to the accounts referred to in these particular books, designated as Coos River Boom Account, the testimony of the witnesses W. T. Merchant, John C. Merchant, P. L. Phelan and W. F. Squire establishes beyond question that during the time they had access to the books and were conversant with the details of the transactions of the firm of E. B. Dean & Co., of C. H. Merchant as Receiver for E. B. Dean & Co., and the Dean Lumber

Company, covering a period of at least 15 years, this account only applied to the items affecting the two booms in controversy; that is the charges for material and labor which went into their construction, maintenance and operation, and the credits received from their earnings.

The next important point for the appellees to establish is their right to these interests, they not having been the original parties to it, with the exception of a one-eighth interest originally obtained by Bernitt. In establishing the fact that the agreement did exist in 1881 or thereabout, the appellees proved the fact that Bernitt was at least one of the original builders of the Lower Boom and that he and his rafting partner Klahn purchased a part interest in the Upper Boom. However, his testimony would seem to establish the fact that they procured their one-quarter interest before the Upper Boom was completed, and therefore that the $750.00 paid by his partner and himself was at least used in its completion. However, the books themselves show that they came into the transaction shortly after the principal charges were made for the construction of the Upper Boom, and that ever since said time Bernitt at least was recognized in all the dealings had in connection with

its operation, maintenance, additional construction and earnings. To establish the conveyance to himself from his former partner Klahn, of his one-eighth interest, Exhibit No. 8 was introduced. This instrument was executed in the year 1884 by William Klahn to E. W. Bernitt, more than twenty-nine years ago. That this instrument clearly sets forth the understanding of these partners, of their respective interests, at a time when the matter was fresh in the minds and memories of all parties concerned, can hardly be controverted. It is not conceivable that Klahn and Bernitt would have that understanding, without all the parties knowing just what they claimed. E. W. Bernitt has continued all these years to hold and claim his interests in those booms in conformity with that understanding expressed in the Bill of Sale (Exhibit No. 8), and no one has heretofore questioned that claim. He has not only continued to assert that claim but has continued in possession of and maintained and operated these booms and shared in their profits and losses with the others, until ousted by the appellant in the year 1909.

As to the interest, however, of Victor Wittick we are not quite so fortunate as to have such a clear record chain of title.

He must rely largely upon the testimony of his predecessors and their memory, which possibly may be in some instances faulty as to unimportant details. There is, however, no claim by the appellants, nor is such a theory tenable, that Wittick's interest in these booms or the right to use the land for boom privileges is in any manner different from that of the claim of E. W. Bernitt. If the appellee Bernitt by the testimony has established the original agreement is such as he claims, the testimony also shows that Wittick and his predecessors have contributed to the expense of the maintenance, operation and construction of the booms, and also participated in the profits thereof, and shared in the losses in like manner as Bernitt, and the owner of the other half interest. The testimony shows conclusively that if there is such an agreement as appellees claim, and E. B. Dean & Company had a half interest, Bernitt succeeded to a one-fourth, and Wulff and Young, the original partners, had a one-fourth. Wittick claims to have succeeded to, and there is nothing in the testimony to controvert the claim that he did succeed to, the interest of Young and Wulff. The testimony of George Wulff (at page 136 Trans.) is to the effect that he acquired

his partner Young's interest, and that he sold out to Haglund and Mattson. Mr. Wulff is also quite positive that, in selling to Haglund and Mattson, account was taken of his interest in the boom in fixing the price; that the value of the rafting gear which he sold to these parties in the same transaction was from twelve to fifteen hundred dollars; that he obtained $2400.00 from them for the entire interest in the rafting gear and the booms. Alfred Haglund testified (Page 186 Trans.) that he and John Mattson bought a one-fourth interest from George Wulff, and he is quite positive that he was given a bill of sale for it at that time and that it was drawn up by Judge Hall, and that they paid Mr. Wulff $2400.00 for said interest. This was about the year 1889. He continued to operate for about five years and sold out to Alex Tast; that his partner, John Mattson, sold out, before he did, to Robert Kruger. Alfred Haglund is quite positive in his testimony that he purchased the interest in the boom from George Wulff. The testimony of John Mattson is that he and Alfred Haglund about 1890 purchased George Wulff's interest in the booms; that he and Haglund owned these interests with E. W. Bernitt and with E. B. Dean & Company; that the interest he

and Haglund owned was a one-fourth; he also says that he sold out to Robert Kruger about a year and a half afterwards; and that he sold the interest he had in the booms, together with his rafting gear.

The purchaser of the Haglund interest was not available, having returned to Finland and having ceased to be a resident of the United States.

The appellant introduces the testimony of Robert Kruger, and there is an obvious attempt on the part of said witness to discredit the claims of appellees in these booms. However, (At page 293 Trans.) he states that there is no unfriendliness between himself and Bernitt, but he shows by his answers to the questions following on the same page that there is no friendship, but there must be a distinct and positive feeling of unfriendliness between himself and Bernitt. These men were neighbors in a small town for many years, yet the witness admits that they did not converse during that time. In one of his answers referring to Bernitt, he says that they never were friendly in the beginning. There is no question therefore, from his testimony, that he admits himself to be an unfriendly witness. All through his testimony, however, he admits that he and the oth-

ers at that time claimed an interest in the boom. He says that he paid $500.00 for his interest (at page 288 Trans.) and he says (at page 289 Trans.) that Mattson did not claim he was selling him an interest in any partnership with Merchant or the Dean Lumber Co., but the rafting gear and the gear belonging to the boom.

The testimony of John Mattson (at page 450 Trans.) is to the effect that Robert Kruger paid him $1450.00 and that he sold him a one-half interest in the rafting gear and also a one-eighth interest in the booms. John Mattson also relates a conversation he had with the witness Kruger in which he stated that he had forgotten what he had paid. Kruger has not denied this. Therefore one thing stands out clear in the testimony of that particular witness: the fact that he is attempting to evade a positive statement that he acquired or sold any interest in the boom. All through his testimony, however, he mentions the interest in the booms as being **his,** and also that his coowners at that time claimed certain interests in the boom. But the person who sold to him testifies without equivocation that he did sell him a one-eighth interest in the boom, together with a one-half interest in certain logging gear, and that instead of paying the sum of $500.00 he

paid him $1450.00. The person who purchased from him, C. J. Hillstrom, (page 183 Trans.) states with no uncertainty that he bought a one-eighth interest in the booms from Robert Kruger and that he paid Kruger $1600.00; that he thinks he bought that interest sometime in the year 1890. The witness Kruger in his testimony (page 289 Trans.) states that he owned his interest for eight or nine months and that he sold to Mr. Hillstrom for $1500.00.

If Mr. Kruger originally purchased simply a one-half interest in certain rafting gear for $500.00, it would seem unreasonable to suppose that he could hold that one-half interest for eight or nine months and then dispose of it for three times that price. There can be no misunderstanding as to what Hillstrom thought he was buying. C. J. Hillstrom sold his interest to John Anderson Emmett (page 184 Trans.) after he had owned that interest for about five years.

As before stated, the appellees were not in a position to procure the testimony of Alexander Tast, but the testimony of John Anderson, or John Anderson Emmett, (page 180 Trans.) shows that he purchased the whole interest owned by Tast and Hillstrom in the years 1894 and 1896 respectively. The testimony is quite

clear and distinct as to what he purchased and that he had a conversation with Merchant prior to agreeing to take it from Tast. His testimony shows that he sold his interest consisting of a one-fourth to Matt Klockars and Victor Wittick, one of the respondent plaintiffs in this case, and Exhibit No. 12, consisting of a bill of sale from Anderson to Victor Wittick and Matt Klockars, was introduced. This was the year 1900. Exhibit No. 13 consists of a bill of sale for Matt Klockars' interest to Victor Wittick. Witness Anderson is not very definite as to what he paid for his interest in the boom, and seems to think it was $1600.00, but Wittick testifies he and Klockars were to pay him $3,000.00. Wittick paid Klockars, as indicated (page 173 Trans.) $300.00 for his one-eighth interest and assumed the indebtedness due against both of them amounting to $2500.00, and paid it. Klockers did not pay any portion of the $2500.00. This brings the interest of Young and Wulff down to the appellee Wittick.

The testimony of all these witnesses, even that of Robert Kruger, covering the question of the ownership in the booms, confirms the claim of the appellees as to their interest. The only dissenting testimony given at all is that of P. L. Phelan, wherein he states that Mr. Merchant

gave him to understand that the raftsmen's interest in the boom was to terminate at the pleasure of E. B. Dean & Company. Mr. Phelan was employed by E. B. Dean & Company for about three and a half years, from some time in 1893 to 1896. His testimony was given in July 1912. The conversations which he attempted to relate as having had with C. H. Merchant were anywhere from seventeen to nineteen years previous. He is probably mistaken. It is not reasonable to suppose that these raftsmen would invest several thousand dollars in the construction of these booms with the understanding originally that their rights were to cease at any time E. B. Dean & Company saw fit to appropriate their improvements. Men ordinarily do not do business that way; and even if Merchant had an idea that E. B. Dean & Company possessed any such rights, there is no testimony introduced showing that the original agreement or the agreements under which these raftsmen acquired these interests in the booms were, in fact, of any such nature. Mr. Merchant may have had this idea as to the legal effect of the agreement, on account of the fact that no written conveyance of any interest in the land had been made. However, neither of these appellees or their prede-

cessors were present or in any manner consulted, or acquiesced in any such statement. This testimony is entirely hearsay and incompetent, and was given over the objection of appellees' attorneys.

Mr. Squire, another witness and former Manager of the Dean Lumber Company, claims that he made various attempts to learn the exact status of the booms. His testimony shows that he and Bernitt frequently discussed the management, control and maintenance of the boom, but he never at any time sought to learn from him or respondent Wittick what interest they claimed (page 280 Trans.), but he admits (page 283 Trans.) that Bernitt told him that the raftsmen, meaning himself, Klahn, Wulff and Young, paid for half of it. This was about the year 1903.

The testimony shows that the firm of E. B. Dean & Company consisted of E. B. Dean, David Wilcox and C. H. Merchant at the time the booms were originally built. It shows that the raftsmen continued to own whatever interest they had in the boom all through the partnership of E. B. Dean & Company; that the partnership was somewhat changed in 1892 or 1893 by C. H. Merchant retiring from it, and at that time he ceased to be a partner and also ceased to act as the Manager,

and thereupon the witness Phelan acted as Manager for them on Coos Bay. There was no change in the operation of the boom, regardless of what Mr. Phelan may have thought about the ownership of it. Bernitt and the other raftsmen who claimed an interest with him continued to operate it, contribute their share towards its maintenance and participate in its profits and losses the same as previously.

Some time in 1896 C. H. Merchant again took charge of the E. B. Dean & Company interests, this time as Receiver, and all through the receivership the arrangements concerning the booms were continued as formerly, so far as the raftsmen's interests were concerned; they participated in the profits and losses, and operated and maintained the booms.

Subsequent to this, in 1903 the Dean Lumber Company, a corporation, appears upon the scene and they continue in the ownership and management of the E. B. Dean & Company property down to the year 1907. During all of this time the management, control, profits and losses of the boom were continued as formerly. The interests of the raftsmen were not disturbed.

In 1907 the property was sold by the Dean Lumber Company to C. A. Smith,

and for at least a year and a half subsequent to this time these appellees continued to operate, control, remain in the possession of the booms, and participate in the profits and losses as formerly, without any question on the part of C. A. Smith or Smith-Powers Logging Co.

The Smith-Powers Logging Co. claims to have acquired the interest in these booms some time in July 1907, according to its Answer on file in this suit. The testimony of the Managing Agent, A. H. Powers, and of C. A. Smith, is to the effect that it was agreed that the Smith-Powers Logging Co. should take over this property shortly after C. A. Smith purchased it in 1907, and that under and by virtue of that agreement the Smith-Powers Logging Company claimed the ownership of it from July 1907 (Page 343 Trans.) However, Mr. Smith does testify that the paper title possibly passed about March 1909 to the Smith-Powers Logging Company. Mr. Powers also testifies that he thinks it was some time about March 1909 that the paper title passed.

After the rafting season of 1907 and 1908 and some time in July 1908, or probably later although at paragraph XI of the answer it is alleged to be October 1907. Mr. Powers says he received his first information as to the appellees'

claim of interest in these booms, and at that time or a few days afterwards the Smith-Powers Logging Company rejected any claim of interest on the part of Bernitt and Wittick. At this time, however, the Smith-Powers Logging Company had no deed to the property.

The main point in view at this time is, that the first objection to the claim of ownership of these appellees and their predecessors was made by the Smith-Powers Logging Company, C. A. Smith, or whatever interests succeeded to Mr. Smith some time about August 1908. Mr. Bernitt says that in the summer or fall—he thinks in the fall of 1908, just before the logs began to come out, was the first time they knew that the Smith-Powers Logging Company, C. A. Smith or the C. A. Smith Lumber & Manufacturing Company claimed to own the whole of the booms.

Regardless, however, of the refusal of the Smith-Powers Logging Company or the C. A. Smith Company interests to recognize these rights in 1908, the appellees, both of them, appeared on the scene in the fall of 1908 when the rafting season began and, as their testimony shows, attempted to and did catch the logs, and attempted to and did raft them the same as formerly. The Smith-Powers Logging

Co. did not object to their working there, but in fact availed itself of their assistance, Mr. Powers even conversing with Bernitt about it. Subsequent, however, it prevented them from collecting all or any portion of the sums due for boomage or for their services in the rafting of logs and piling caught in the booms. This work they continued to do until toward the end of the rafting season in the spring of the year 1909, at which time they found they were completely ousted. Mr. Powers of course swears positively, as usual, that he hired these men by the day. This Bernitt denies, and Powers admits that he made no direct contract with them.

There is no attempt on the part of the appellants to show that their predecessors ever denied the interest claimed by appellees and their predecessors. The nearest attempt is the testimony of P. L. Phelan and W. F. Squire. the first named a former Manager of E. B. Dean & Company for about the period of three years, seventeen or eighteen years previous, and the latter a former Manager of Dean Lumber Company between 1904 and 1907. They, however, simply state what their understanding was, but both admit never having attempted to learn from the appellees or their predecessors

what interest they claimed to have in the premises, and admit that Bernitt, with whom they seem to have had all their dealings in connection with the boom, never stated to them what he claimed for himself and his other partners or co-owners. Yet Mr. Squire conferred with Bernitt repeatedly whether they (the raftsmen and the Company) should spend any more money on the booms than to keep them sufficiently in repair to do each season's work. (Page 278 Trans.) Showing that even Mr. Squire with his apparent ignorance of appellees' claims, considered them of sufficient importance that if any money was to be expended for permanent betterments, appellees interest was of such a nature that they should contribute toward the expense. These witnesses do not testify that they in any manner disturbed or attempted to disturb or change the conditions or agreement under which these parties were holding this property and carrying on this common enterprise. The fact is the business was carried on the same as in previous years and there was no attempt to disturb the arrangement. No occasion ever arose for appellees to question the status of the matter, or to do any more than had been formerly done. These witnesses do not testify that they or any oth-

er person informed these appellees or their predecessors what their idea of the nature of the relationship was or what the agreement was, or what they thought their claims to the boom amounted to, or that their principals revoked these agreements. Neither do they testify that their principals ever revoked this agreement as claimed by the appellees to have existed for all these years prior to the time they were employed as managers. They must have known what the claims of appellees were. The principals of the witness Phelan, were two members of the former partnership of E. B. Dean & Company, that is E. B. Dean and David Wilcox; they were the original members with whom this agreement was made, and their own account books show they kept track of the earnings of the boom and the expense of maintaining it, its costs of construction and profits, and charged all the expenses against those profits. When the profits were not sufficient to pay the expenses they and the other members contributed their portion to make up the difference. Appellants introduced no testimony to show that E. B. Dean & Company, C. H. Merchant as Receiver for E. B. Dean & Company, or Dean Lumber Company ever ousted Bernitt or his coowners or partners, or notified them that

they denied their claim of ownership or partnership, but the testimony shows they permitted the matter to stand as it had always stood. If, therefore, under the original agreement, as shown by the testimony, the rights claimed by Bernitt actually vested in himself and his partners and co-owners, the record establishes that they continued at least down to the time C. A. Smith acquired title to the land and whatever interest he obtained in the boom.

Whether the facts relied upon by the appellees are sufficient to establish a claim of ownership in the booms themselves and an easement or irrevocable license to continue the use of the land for maintaining and operating booms, or whether these rights ceased at the will and pleasure of the owner of the legal title to the land, is a question of law.

The pleadings admit the ownership of the legal title to the land in the complaint described in paragraph four to have been in E. B. Dean & Company in 1881 and now to be in the defendant Smith-Powers Logging Company by reason of the purchase of the land through the grantees of E. B. Dean & Company.

It would seem to be very clearly established that the terms of the original con-

tract were in the nature of a partnership. This agreement was

> "A contract of two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and divide the profit and bear the loss in certain proportions."
>
> 30 Cyc 349.
>
> Cogswell vs. Wilson, II Or. 371.
>
> 4 Pac. 1130.

According to the testimony of Bernitt, which is corroborated by Wulff, the members of the firm of E. B. Dean & Company were to furnish the land to be used in the enterprise and one-half of the money to build the booms. Young, Wulff, Klahn and Bernitt were to furnish one-half of the money between them, equally, and to furnish the skill and labor in operating the booms; and all were to contribute in their respective proportions toward the maintenance of the boom and in like proportions share in the profits. The testimony shows that this was done by the original members during their ownership, and by them and their successors, in all for twenty-seven years, down to the time when the appellants took exclusive pos-

session of the property and ousted the appellees.

"A partnership has been defined to be a contract in which two or more persons agree to put in something in common with a view of dividing the benefits which result from it."

Flower v. Barnekoff, 20th Ore. 132.
25th Pac. 370.

Citing, Strader v White, 2 Neb. 362.

"Where it appears that there is a community of interest in the capital stock, and also a community of interest in the profits and losses, then it is clear an actual partnership exists between the parties."

Flower v. Barnekoff, 20 Or. 132.
25 Pac. 370.

Citing, Berthold v. Goldsmith,
24 How. 541.

"It is not necessary that there should be an express stipulation to share profit and loss in order to constitute a partnership. If it were understood between the parties that

there was to be a communion of profit, that would be a partnership."

Bloomfield v. Buchanan, 13 Ore. 108, 8 Pac. 912

North Pacific Lum. Co. v. Spore, 44 Ore. 462, 75 Pac. 890.

Berthold v. Goldsmith, 24 Howard 536, 16 U. S. Law. Ed. 762

Fleming v. Lay, 48 C. C. A. 752, 109 Fed. 955

Harvey C. Childs, 22 Am. Rep. 387

McDonald v. McLeod (Colo) 33 Pac. 285.

While the original undertaking was unquestionably that of a partnership, the changes subsequently made in the ownership of the different fractional parts of the whole render it somewhat confusing as to how long it continued to exist, and where the doctrine of co-ownership and tenants in common should be applied. It would seem that the mere retirement of Young and Klahn, the acquirement of their interests by their co-partners, Wulff and Bernitt, the continuance of the operation of the business the same as formerly without any objection by the members

of the firm of Dean & Company for eight or nine years subsequent, would be sufficient for the Court to imply that the other partners concurred in the change. After 1889 or 1890 there were many changes in the interests formerly owned by Wulff and Young, but it does not seem there can be any logical objection to the conclusion that upon each sale the partners concurred in the change. The business was conducted in all respects the same as in former years, and from the conduct of the parties, the Court would be justified in holding that there was an implied concurrence upon the part of the others to the entry of these various persons from time to time into the partnership, and the retirement of the others.

> "A person purchasing a partner's interest in a partnership may become a partner therein by the implied concurrence of the remaining partners, is a principal well established by law."
>
> 30th Cyc 605.

E. B. Dean & Company kept the accounts and continued to share in the profits, made possible by the skilled labor of these other persons in catching and car-

ing for the logs and conducting the business of operating the boom, and dividing with them the expense necessary to maintain the boom, in the original proportion. It is true that these parties were not paid wages for attending to the catching, storing and sorting of the logs and timber that came into the booms by the partnership, but as the witness Bernitt has testified, E. B. Dean & Company was to furnish the lands, and after the boom was built the raftsmen were to attend to its operation and carry on the business of catching, storing and sorting logs, and operating the booms. However, the testimony shows that when repairs were necessary upon the boom, they were made by the raftsmen, and their wages as well as the material that went into the repairs were charged up against the earnings.

After C. H. Merchant took charge of the property of the firm of E. B. Dean & Company as the Receiver, the appellee Wittick acquired his present interest, about the year 1900. Whether under those circumstances it would be possible for an implied concurrence on the part of E. B. Dean & Company to the change in the interest of John Anderson Emmett, whom he purchased from, would of course be a question of doubt. It is also a ques-

tion of doubt as to whether upon the acquisition of the property by the Dean Lumber Company, the partnership did not cease to exist, owing to some authorities holding that partnerships cannot exist between natural persons and artificial persons.

If these appellees Bernitt and Wittick had any vested property rights whatever they could not be destroyed or annulled upon the caprice of their other partners or co-tenants. Whether these rights, subsequent to the dissolution of the partnership, continued to exist under the doctrine of tenancy in common or co-tenancy, that would not deprive appellees of the right of joint management, control and use of the property. Nor would it assist these appellants in their attempts to take from appellees their right to the use and enjoyment of the property involved.

While the appellees and the corporation Smith-Powers Logging Co. may not be partners, yet under appellees' claim of ownership they are at least co-owners. And

> "Whether the relation of partners or co-owners exists, the rights of the parties are the same, at least so far as concerns the common property, as such; and a co-owner, equally with a

partner, may have an accounting and a receiver appointed."

Hacket vs. Multnomah Ry. Co. 12th Or. 124 6 Pac. 659-663

Calvert vs. Idaho Stage Co., 25th Or. 412, 36 Pac. 25

Marx v. Goodnough, 16 Ore. 26-31, 16 Pac. 918.

Mathewson vs. Clark, U. S. Sup. 6 How. 122 Law Ed. V. 12, 370.

Flower v. Barnekoff, 20th Or. 132, 25 p. 370

"It seems to be the better rule that though the exact relation of the parties may be improperly characterized an accounting will be proper if they sustain such relation to each other as that equity may assume jurisdiction."

I Cyc 437

Shirley vs. Goodnough, 15th, Or. 642. 16th Pac. 871.

The appellees' theory of the case is this. Although there may not have been any agreement that the land itself should become partnership property, or that appellees or their predecessors were to acquire

any legal title thereto, yet by reason of their entering upon the land at the solication of the members of the firm of E. B. Dean & Company, the owners, and making valuable and permanent improvements thereon with their knowledge and consent, and joint participation, that was sufficient to give them a right, license or easement in the land to continue to use and occupy the same with their boom, and maintain it and enjoy the fruits, and share in their proper proportion with the other co-owners or partners. As to whether they were partners with E. B. Dean & Company or that firm's successors and assigns, is not material, because whatever rights they may have had became vested and were acquiesced in and E. B. Dean & Company, through their authorized Receiver, and the Dean Lumber Company.

"One cannot induce another to go upon his lands and make valuable improvements, and then revoke the license to his prejudice."

Hallock vs. Suitor, 37 Ore.II,
60th Pac. 384.

Curtis vs. LaGrande Water Co., 20 Or. 34, 23 Pac. 808.

Miser vs. O'Shea, 37 Or. 231
62 Pac. 491
82 Am. St. Rep. 751

Shaw vs. Profit, 110 Pac. 1092.

"If a party has paid a consideration therefor or been encouraged by any participation in a common enterprise, or induced by a definite oral agreement to expend money in making permanent valuable improvements, the parol license upon the faith of which he has acted in executing it cannot be revoked to his prejudice."

Ewing vs. Rhea, 37 Or. 583
62 Pac. 790
52 L. R. A. 40
82 Am. St. Rep. 783

Shaw vs. Profit, 110 Pac. 1092
57 Or. 192

"Where money has been expended on property licensed, by making improvements, equity regards it as an executed contract and will not permit it to be revoked, regarding it substantially as an easement, the revocation of which would be a fraud on the licensee."

25 Cyc 646, and Note 46

Shaw vs. Profit, 57 Or. 192
109 Pac. 584 & 110 Pac. 1092,

and earlier cases.

But it has been repeatedly held in our local Courts:

"That a parole license cannot be revoked after the licensee has expended money or performed labor in making valuable improvements on the land on the faith thereof."

Bowman vs. Bowman, et al, 35 Or. 279 57 Pac. 546.

Coffman v. Robbin, 8th Or. 279.

Huston v. Bybee, 17 Or. 140,
20 Pac. page 51.

Combs v. Layton, 19th Or. page 99
26th Pac. 661.

Curtis v. LaGrande Water Co., 20th Or. Page 34, 23 Pac. 808.

Also 25th Pac. page 378.

McBroom v. Thompson, 25th Or. 559 37th Pac. 57

Garrett v. Bischopp, 27th Or. 349
41 Pac. page 10

Sumpter Railroad Co. v. Gardner, 49 Or. 412
90th Pac. 499.

Shaw v. Profit, et al. 57th Or. 192,
110 Pac. 1092.

"Cases may arise, and have arisen, where a license to occupy land has been intended and understood as a

mere personal favor to the licensee to give him a place to live or to occupy for some other beneficial purpose not transmissible, but revocable at will. Then expenditures would naturally be made accordingly. In other cases the granting of the license has been in terms an assurance of permanent possession. It is evident the same rule cannot apply to both cases. The revocation of the license even after expenditure made on a consequence of it is a right, in the other a fraud."

Metcalf v. Hart, 3 Wyo. 513-547
27 Pac. 900, 31 Pac 407

Cited in

Shaw v. Profit, 110 Pacific 1092.

STATUTE OF FRAUDS

"Where an oral contract, which is unenforceable by reason of the Statute of Frauds, has been entirely performed, the rights of the parties are no longer effected by the statute, and it is immaterial that either party might have refused to perform. Where oral agreements creating interests in land have been carried into effect by the acts of the parties, the

rights thereunder are not effected by the statute of frauds."

20 Cyc 302-303. Note "69"

"An executed license is treated like a parole agreement in equity, it will not allow the statute to be used as a cover for fraud."

Curtis v. La Grande Water Co. 20 Or. 34 23 Pac. 808, 25 Pac. 378

"The decisions of Courts of Equity on that statute (Statute of Frauds) proceed on the principle, not that the right passes by parol license or agreement, but that wherever one party has executed it by payment of money, taking possession and making valuable improvements, the conscience of the other is bound to carry it into execution, and equity will compel him to do it."

Maple Orchard & Co. vs. Marshall, (Utah) 75 Pac. 369

"This Court has adopted the rule that if a party relying upon the faith of

an express parol agreement, makes permanent valuable improvements upon an estate, which may inure to the advantage of the owner thereof, the license upon the faith of which the improvement was made cannot be revoked to the prejudice of the party executing it."

Miser vs. O'Shea, 37th Or. 231,
62 Pac. 491.

"While ordinarily an easement can be created only by writing under seal, it may be created by adverse user, by estoppel or part performance of an oral agreement."

"Estoppel not necessary to plead, and in some instances need not be alleged. The contract set up in the Complaint operates as an estoppel."

Shaw vs. Profit, 57 Or. 192,
110 Pac. 1095.

It may be urged that while the right, license or easement under which appellees claim to hold, would be good as to E. B. Dean & Co., or the members of that

firm, it would not apply to the different and succeeding grantees. That the conveyance of the whole legal title by the partnership of E. B. Dean & Co., or any of their grantees would be a revocation thereof.

This, however, is not the rule, because

"A license, irrevocable as to the licensor, is binding on the grantee taking with notice."

Shaw vs. Profit, 57th Or. 192, 110 Pac. 1094

"It is a well settled principle that to constitute notice it is not necessary that it should be in the shape of a distinct formal communication, and it will be implied where a party is shown to have had such means of informing himself as to justify the conclusion that he has availed himself of them."

"Notice should with rare exception be implied where a party is shown to have such knowledge as would superinduce further inquiry in an honest, conscientious man."

Carter vs. City of Portland, 4th Or. 350.

NOTICE TO GRANTEE OF LICENSOR

"Possession operates as constructive notice to him."

2 Pom. Eq. 613.

Petrain vs. Kiernan, 23 Or. 455, 32 Pac. 158

McDougal v. Lane, 39 Or. 212, 64 Pac. 864

Shaw vs. Profit, 57 Ore. 192, 109 Pac. 584 110 Pac. 1092.

This, therefore, brings the case down to the time that the interests of C. A. Smith intervened. The appellees admit that it is not tenable to claim under the evidence that C. A. Smith was a partner. The testimony of Mr. Smith and Mr. Powers, and of other witnesses, show that he purchased the property of the Dean Lumber Company in February 1907; that he did not know these plaintiffs or know of their claim, and that he agreed with Mr. Powers about the time of the purchase that the property should be turned over to a logging corporation which they would organize. The appellants seek to set up in their answer and raise the issue that Mr. Smith and Smith-Powers Logging Co., were innocent purchasers and

without knowledge of the claim of appellees or of their possession. Mr. Smith in his testimony admits that he was not here at the time the transfer was made in February 1907, at Sacramento, California, (page 223 Trans). He saw the boom two months before he purchased it but did not have anybody else inspect it at the time or before he bought it, with a view of ascertaining whether anyone was in possession, and if anyone was in possession he did not investigate.

Mr. Powers testifies that he was over to the booms some time in February 1907 and while he at first seeks to evade the admission that there were any logs in them whatever, he finally does admit that he noticed some logs or rafts over there in that vicinity. The uncontradicted testimony of the appellees, and it is also the testimony of the appellants, that the rafting season for handling the logs coming down in freshets from Coos River and its tributaries is from October and November to March. The testimony is that some time the seasons are a little earlier than others, and some times they are a little later, but the month of February itself is the month when there is no question about the raftsmen being required to be busy catching logs in the boom and rafting

them therefrom. The uncontradicted testimony of Bernitt is, that during the month of Feruary 1907, he and Wittick were over there rafting and catching logs in the boom; that either he or Wittick or some of their men were there and in possession of the boom at all times; and that they had scows there in which they lived. These boom-rights used and exercised by these raftsmen as partners and co-tenants or otherwise had been in use and under their dominion for a period of over twenty-seven years. The community is small. The purchaser of the Dean property, Mr. Smith, is a man skilled in the saw-mill and logging business, and in purchasing property of that character. If he acted prudently, he would investigate not only the paper title to the property, but also its physical condition. Where it was property of this character which required the co-operation, work, skill and labor of other persons to care for, handle and operate it, it would certainly seem strange if he did not investigate the manner by which it was operated, who the parties were, and all the details in connection with it. Undoubtedly the books and accounts of the Dean Lumber Company were open to his inspection, and were by him or his agents duly inspected. These appellees were in the ac-

tual possession of these premises, catching logs therein, and were living with their crews of men thereat and making up rafts therein and rafting therefrom. The booms were at that particular time earning money for their co-owners, and the credits and charges were being made upon these books of the Dean Lumber Company covering these earnings and charges. In view of all of this it is hard to see how Mr. Smith can successfully take the position he is an innocent purchaser and had no notice. There was at least sufficient notice to put him upon inquiry; he did not make any inquiry of these appellees so far as the testimony discloses, neither did he consult them in any regard, either in person or by agent. Did not even examine or cause the booms to be examined (page 223 Trans.) The testimony of Mr. Bernitt (Page 448 & 449 Trans.) is to the effect that the booms were full of logs from some time in December 1906 to and including March 15th 1907, and that these appellees were in possession catching logs, sorting them, making up rafts, living there with their scows a part of the time, had their men employed in the work living there, and that they were furnishing logs for the very mill which Mr. Smith purchased from the Dean Lumber Company, and al-

so were furnishing logs therefrom to the mill of the Simpson Lumber Company, the two principal mill industries of Coos Bay. If he had no notice, certainly there was a negligent lack of interest or inquiry upon the part of Mr. Smith or his agents.

Going on down further to the grantee of C. A. Smith, to-wit, the Smith-Powers Logging Company, a creature of his own creation and control: Both he and Mr. Powers testified that he is the principal officer, controlling and majority stockholder of the C. A. Smith Lumber & Manufacturing Company; that he is the President and a director, and holds in person a few shares of the stock of the Smith-Powers Logging Company; but admits that the C. A. Smith Lumber & Manufacturing Company is the owner of the principal bulk of the stock of the Smith-Powers Logging Company. Mr. Powers also says (page 394 Trans.) that the principal objects and purposes of the corporate existence of the Smith-Powers Logging Company is to furnish logs and carry on and take charge of the logging business of the C. A. Smith Lumber & Manufacturing Company. It was decided when the Dean Lumber Company property was purchased that they would form this logging company, and it was

so formed. With Mr. Smith's knowledge, or at least his implied knowledge, of the claims of these appellees he cannot successfully evade and dispossess them of their rights by creating a corporation of his control and conveying this property to it and having the title vest in it as an innocent purchaser.

Waiving, however, for the moment, the legal aspect of that question, and reverting to the facts as they appear in the testimony. It cannot be said therefrom that the Smith-Powers Logging Company was without notice. At the time of the purchase by Mr. Smith these appellees were actively engaged in operating the boom and were in possession of it under the terms and conditions of the original partnership agreement, and they so continued until long after Mr. Smith had acquired the legal title. Mr. Bernitt, in his testimony, was somewhat mixed as to the date of his first meeting Mr. Powers, and was evidently mistaken when he stated that the year was 1908, and so was Mr. Powers, because subsequently they correct themselves a number of times and state it was the year 1907. This is corroborated by the testimony of Mr. Squire, and other circumstances. The testimony, however, of Mr. Powers and Mr. Bernitt is irreconcilable upon one point: Mr.

Powers states positively although his answer alleges the time to be October 1907, that he did not know of the claim of these appellees until the following year, after he had sent his man Varney over the boom to reconstruct it. Then he learned it through a man by the name of Wicklund. On the other hand, Mr. Bernitt testified that in the year 1907, some time about July, he had a conversation with Mr. Powers, and that Mr. Powers told him that Mr. Smith wanted him to purchase the boom property, but that he would have nothing to do with it as long as Bernitt and Wittick had an interest in it (Page 148 Trans.) Mr. Powers is mistaken, and did have knowledge of these claims despite his positive assertion to the contrary. This, the testimony of Mr. Arno Mereen, whose occupation is General Superintendent of the C. A. Smith Companies, seems to establish. Mr. Mereen says that he had full charge of the business. This of course refers to the C. A. Smith Companies. He testifies (page 334 Trans.) that in 1907 he had a conversation on the dock in front of the old Dean Lumber Company's store with Mr. Bernitt, one Sunday morning; that he (Bernitt) and Mr. Powers had been talking in connection with some claims that he was making relative to the ownership or

partnership in the boom with Dean Lumber Company, and he (Mr. Bernitt) still claimed he held an interest in them. The witness says that Mr. Powers called his attention to it, and he, Mereen, then told him that they did not know him in the deal at all and that they could not recognize him in any such deal. They knew of no such claim in taking over the property, and that they were not aware that there was any such deal. Mr. Bernitt, in relating the substance of the conversation which he had with Mr. Mereen, differs somewhat in detail, but agrees in substance. He says that it was either the Spring or Summer of 1907 on a Sunday morning that he met Mr. Mereen on the wharf. Mr. Mereen also states that it was on a Sunday morning. Mr. Bernitt said that Mereen was standing there with some other gentlemen, but he did not remember just who they were, and, "As I came along he says to me, 'I understand that you and a party in North Bend claim a half interest in that boom over there.' I told him that we did, and he said that that was no way to have it, that they had to own it all or none." That this was in the summer of 1907, and that the next conversation he had with Mereen was about some 90 foot boom sticks, that fall (page 106 Trans.) Mr. Bernitt says that

he is not sure whether Mr. Powers was there or not. Mereen also remembers the 90 foot conversation in 1907 (page 334 Trans. Mr. Powers (page 358 Trans). gives his version of this conversation and says he was present. Mr. Powers, in trying to fix the date when it was agreed between the Smith-Powers Logging Company and C. A. Smith that that company should take over the boom, fixes it in July or August of 1907, but he thinks it was in August (page 374 Trans.) He says, on page 524, of the testimony, that the price for the booms was charged on the books in the fall of 1907. By referring to Exhibit "C" of the appellants' testimony, which is a statement of charges and credits concerning these booms, and the extensions and enlargements thereof, there is one item appears entered $2000.00 for booms. This was, according to the statement, entered at a much later date, sometime in 1909. Mr. Brown in his testimony indicates that this was the item which the Smith-Powers Logging Company paid or agreed to pay C. A. Smith of the C. A. Smith Lumber & Manufacturing Company for the property. It is established by the testimony that the legal transfer of this title was not made until 1909.

Mr. Powers testified that in his conver-

sations with Mr. Bernitt in 1907 he told him to go ahead and do the rafting and handle the boom the same as he had always handled it previously (page 354 Trans.) Mr. Powers did this, according to his own testimony, without obtaining a statement from Mr. Bernitt as to what he and Mr. Wittick claimed with respect to the boom, or any details in connection with it. This looks as if Mr. Powers had made another mistake in his testimony. It hardly seems reasonable that a business man with the responsibilities of one in his position would not go into details more deeply, nor does it seem reasonable that these two men would discuss all matters and things pertaining to the boom and omit the most essential part of all, particularly in view of the contemplated purchase by Mr. Powers' company.

However, unless Mr. Smith was an innocent purchaser and purchased without notice, or without sufficient notice to put him on inquiry, it could hardly be said that the Smith-Powers Logging Company could claim lack of notice. Mr. Powers is Vice-president and Managing agent of the Smith-Powers Logging Company and Mr. Mereen is the General Superintendent of the C. A. Smith Companies, but admitted knowledge of the

claims prior to the purchase or making of deed in 1909. The Smith-Powers Logging Company certainly had knowledge of these claims according to their testimony.

The fact that there was no deed or other instrument of record upon the records of Coos County showing title in appellees at the time Mr. Smith purchased the tidelands is not sufficient to make him an innocent purchaser.

The uncontroverted testimony shows that appellees were in exclusive possession of the booms all during the month of February 1907, and exercising acts of ownership over it (Page 449 Trans. and Bernitt's and Wittick's testimony). They and their predecessors had been in such possession for many years.

This lack of a record title in appellees therefore is no protection to Smith. Such possession was sufficient to put him on inquiry, because

> "It is presumed that things in the possession of a person, are owned by him, and that a person is the owner of property from exercising acts of ownership over it."
>
> 799 L. O. L., Subdivisions 11 and 12.

"Possession is notice of equitable

rights in property sufficient to put purchaser on inquiry."

Stannis v. Nicholson, 2 Or. 332.
Bohlman v. Coffin, 4 Or. 313

"No equitable doctrine is better established than that * * * the person who purchases an estate, although for a valuable consideration, after notice of a prior equitable right, makes himself a mala fide purchaser, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose right he sought to defeat."

Bohlman v. Coffin, 4 Or. 317.

"One who buys land on which a third person has possession of a ditch, and is using the waters thereof, takes with notice of the other's rights, and subject to his interest, whatever it is."

Baldock v. Atwood, 21 Or. 73, 26 Pac. 1058.

"A purchaser of property, failing to make inquiry of a stranger in possession, is in law chargeable with bad faith, and cannot claim the rights of a bona fide purchaser."

Randall v. Lingwall, 43 Or. 383.
73 Pac. 1.
Hawley vs. Hawley, 43 Or. 352.
73 Pac. 3

"Whatever is sufficient to put a subsequent purchaser on inquiry must be considered legal notice to him of all the facts inquiry would have disclosed by the exercise of reasonable diligence."

McDougal vs. Lame, 39 Or. 212,
Jennings v. Lentz, 64 Pac. 864
50 Or. 483. 93 Pac. 327.
Cantwell v. Barker, et al., 62 Or. 12, 124 Pac. 264.

The testimony of the witnesses show that the prevailing price charged for many years for the use of these booms and at the time these appellants took full control thereof was the sum of twenty-five cents a thousand feet for any and all

logs that were caught therein, and a quarter of a cent per lineal foot for piling. This according to the statement furnished by the defendants and introduced in testimony, and also in accordance with the testimony of Mr. G. A. Brown, the book-keeper of the Smith-Powers Logging Company, is the price that the Smith-Powers Logging Company has charged for all logs and piling going through the booms since they took exclusive possession of it.

> "Where common property is occupied adversely or to the exclusion of the other common owners, by some of the co-tenants, those so occupying are liable for so much of the rental value and of the profits thereof as exceed their proportionate share."
>
> 38 Cyc 66.

> "The right of tenants in common to share in the profits of the common property and resort to a Court of Equity for an accounting and a receiver in the case of exclusion of one tenant by another would seem from the necessity of the case and obvious

principles of justice to be authorized."

Hackett vs. Multnomah Ry. Co., 12th Or. 83 6th, Pac. 663.

The appellants naturally claim that in case they are compelled to pay the rental of these booms and for the logs that have passed through, they should be entitled to an offset by reason of the expenditures made by them.

The following, however, is the well established rule:

"That where a tenant in common may recover contribution for necessary repairs, it is held that he cannot do so except on notice and an opportunity to the others to unite in making the repairs, unless made under such circumstances as excuse want of notice."

38 Cyc. 57

That appellants can claim they gave appellees an opportunity to unite in making these repairs, of course is out of the question and entirely at variance with their pleadings and the testimony which

they have introduced in this case. The testimony shows that the appellees are residents of the locality in which the boom was operated, that they were eager and willing to participate in the operation of the boom. The testimony of the witness Bernitt is to the effect that he told Mr. Powers that they would be willing to make extensions and repairs but could not afford to buy a lot of additional lands, and suggested that they take the Simpson Lumber Company in with them, the Smith-Powers people to retain one-third, the Simpson Lumber Company one-third, and Bernitt and Wittick one-third (Page 217 Trans.), and that he proposed this, with Mr. Powers' sanction, to Mr. L. J. Simpson, at that time Manager of the Simpson Lumber Company. Mr. Simpson in his testimony corroborates this portion of Mr Bernitt's testimony, but Mr. Powers denies it.

A great deal of testimony has been introduced on the part of the appellant Smith-Powers Logging Company with regard to certain improvements and expenditures of large sums of money in reconstructing, extending, enlarging and making permanent the booms in question, not only in the enlargement and reconstruction of the booms, but for the purchase of additional lands and the con-

struction of other booms upon them; also in the expenditure of money for surveying and procuring permits from the Government for the maintenance of these log booms. Appellants have introduced in testimony, subject to the objection of appellees, two statements marked for identification "Exhibit C" and "Exhibit D," purporting to show certain expenditures made upon the booms, but it is a well settled principle of law that

> "A tenant in common is not ordinarily responsible to his co-tenant for the cost of improvements or repairs upon the common property unless he so agreed or ratified the act of making them, or unless it is shown that the improvements or repairs were absolutely necessary to the enjoyment or preservation of the property."
>
> 38th Cyc 56.
>
> Cooper v. Brown (Iowa) 136 Am. St. Rep. 768
>
> Rico Reduction Mining Co. v. Mugrov, 23 Pac. 458
>
> Newman v. Dreyfust, 11 Pac. 98
>
> Welland v. Williams (Nev.) 29 Pac. 403.

The appellees have not agreed to or

ratified the act of making any improvements. Appellants assert ownership of the entire title, and unequivocally deny the claim of these appellees. Appellant Smith-Powers Logging Company ousted appellees, and took exclusive possession of the property, and in this suit defends upon the basis of ownership of the entire property.

Appellants cannot excuse themselves of their own wrong in ousting appellees and dispossessing them of their property by showing the expenditure of large sums of money in the reconstruction of these booms and the extension and the purchase of adjoining lands, and building or extending booms thereon.

> "A tenant in common cannot enforce contribution if he asserts ownership of the entire title as against his co-tenants."
>
> 38th Cyc 58. See note 36.

> "They cannot offset their improvements against the rent if they held adversely, even believing in good

faith their own title to be the better."

Bodkin vs. Arnold, 48 W. Va. 108, 35 S. E. 90

"Co-tenant is not entitled to contribution as a matter of right, but merely from a desire of the Court to do justice between all the parties."

Ballon v. Ballon, 94 Va. 356, 26th S. E. 840. 64 Am. St. Rep. 733.

OUSTER

The appellants' answer pleads a denial of appellees' interest, and contains allegations of whole title and possession in appellees.

This is sufficient to support the allegations of ouster contained in the complaint.

38 Cyc 37

Grant vs. Paddock, 30 Or. 312. 47 Pac. 712.

The evidence shows, and answer ad-

mits, ouster when appellants prevented appellees from collecting their charges.

> "The question whether the acts amounted to a dissiezin is a question for the Court."
>
> 38 Cyc. 39

DEMAND FOR ACCOUNTING

Mr. Bernitt testified (pages 152-153 Trans.) that he demanded statements of the condition of the earnings of the boom, of Mr. Brown, the accountant and book-keeper of the appellant Smith-Powers Logging Co., and Mr. Brown (page 296 Trans.) admits a demand by Mr. Bernitt, yet it is the contention of appellees in this suit that even although such demand was not made, or if the Court should not find any testimony that a sufficient demand had been made, the fact that appellants denied appellees' claim of ownership of title and denied that they are entitled to the accounting by reason thereof obviates the necessity of any demand, which theory is supported by the following citations:

> "Where defendant denies plaintiff's title and pleads ownership in himself or another, he cannot defeat re-

covery on the ground that plaintiff did not allege and prove demand before suit."

Rosenau vs. Syring, 25th Or. 386. 35 Pac. 844.

Bolling vs. Kirby, 90 Ala. 215, 24 Am. St. Rep. 789, and notes beginning 816-818.

Ambler vs. Whipple, 20 Wall 546, 22 Law Ed. U. S. 403

"One need not demand payment of a claim before suing thereon, where it appears that a demand will be fruitless."

Kimball vs. Farmers & Mechanics Bank, 97 Pac. 748. 50th Wash. 610.

THE BURDEN OF PROOF

The testimony shows, and appellants' answer admits, that appellees and their predecessors did contribute toward the construction of said booms, were in possession of, did operate and control, and charge and collect the sums of money for its use, in effect as alleged in the complaint. By way of avoidance, however,

appellants allege that no partnership agreement was formed or attempted to be formed, and that appellees did not own or claim title until the beginning of this suit.

If this was merely such a permissive enjoyment of the booms as appellants claim, such allegations constitute an affirmative defense, and the burden of establishing it is upon the appellants.

> "Where a defendant pleads an affirmative defense or sets up in his Answer facts in avoidance, the burden of proof is upon him."
>
> 16 Cyc 931.

> "While an adverse right cannot grow out of mere permissive enjoyment the burden of proving possession thus claimed to have been held by such permission or subserviency is cast upon the party attempting to defeat such claim."
>
> Gardner vs. Wright, 49 Or. 609. 91 Pac. 293.

The appellants specify seventy-three errors of the Court below.

The first error complained of is to the

ruling of the Court that it was unnecessary to decide the character and nature of the appellees' interest in said booms.

The Court did find that their interest in the booms was a valuable right or license of which they ought not to be deprived without remuneration according to the value of the plant. The Court held that it was irrevocable to the extent that it could not be appropriated without remuneration.

The evidence shows what that interest of the appellees was, how it came to be, and that it continued to be recognized for a period of nearly twenty-nine years. The undisputed testimony shows that this right or license was recognized by all of E. B. Dean & Company's successors, and even by the appellants in this case for a period of at least over eighteen months after it was acquired by Smith.

In specifying the errors claimed by appellants they have not discussed in detail how the Court is in error, except some are touched upon in a general way under the head of Points and Authorities. Therefore it is impossible for appellees to anticipate. The preceding statement of the case together with the authorities cited therein, and also the portion of this

brief following, it is felt fully rebuts and covers such objections.

Answering Appellants' Points and Authorities:

I

The question of statute of frauds, or Section 808 of Lord's Oregon Laws is previously discussed.

II

Counsel for appellants claims that there is no evidence showing a partnership agreement, but insists the testimony supports their theory of a working agreement only.

The testimony of Wulff (p. 135 Trans.) shows that Dean & Company contributed only one-half toward the cost of the booms, and the appellees and their predecessors the other half. This is supported by the testimony of Bernitt (pp. 138, 139,141 Trans. and various other places) and the entries in the books of E. B. Dean & Company (Exhibits 1, 2, 3, 4, 5, 6 & 7) referred to in detail in the fore part of this brief. This testimony is not controverted in any particular and establishes the fact that the rafters contributed one-half toward the construction of the booms. Does such a state of facts support or oppose appellants' theory of a

working interest? If it was a working interest only, Dean & Company would have required them to contribute only their skill and labor. The testimony of Bernitt (pp. 142 & 143 Trans., and other places) shows this agreement was at the solicitation of Dean & Company.

III

Appellants claim if a partnership existed, appellees permitted, consented to and ratified the sale by E. B. Dean & Company to Dean Lumber Company and cannot now question the subsequent transfers. They cite a number of authorities to support the rule that a sale by one partner may be ratified by the other partners. Such may be the rule, yet how does it apply in this instance? There is no testimony that appellees knew when the sale to Dean Lumber Company was contemplated or was being made, or that it was made until after conveyance passed. The undisputed facts are that appellants continued in the possession, operation and management of the booms, receiving their share of the profits the same as formerly (pp. 166, 173, 276, to 278 & 300 to 303 Trans.) Nothing apparently ever occurred which would in any way lead them to believe their interests were not recognized by Dean Lumber Co.

In fact those interests were recognized by Dean Lumber Co. by allowing them to continue in possession and management and to share in the profits. By reason of such possession and continued use the law would presume Dean Lumber Co. knew of their claims and acquiesced, and it is too late for Mr. Dillman to disavow it now. They were justified in assuming that whatever transfer had been made was subject to their interests.

> "If one partner not in course of trade, especially if it is made under such circumstances that it practically terminates the business, and where such a transfer is made without the consent of a co-partner who is accessible at the time, it is a fraud on the latter and may be avoided by him, although it be made to a bona fide creditor of the firm. Such transaction will vest the transferee with the interest of the transfering partner only."
>
> 30 CYC 495. See note.

These appellees were here, available, in possession of, and attending to the business of the booms, yet were not consulted (p. 166 Trans.) If it was the inten-

tion of Dean Lumber Co. to claim the whole, why was not some notice given them so they could protect their interest?

This sale to Dean Lumber Co. did not terminate the business, nor was it intended to. It continued for a number of years after with Dean Lumber Co. from about February or March 1903 to February 1907 (p. 464 Trans).

Just what was said by Mr. Merchant to Mr. Dillman and Mr. Bernitt at the time he introduced them is disputed. Whichever is correct, is not material, in view of the continued relations between the appellees and Dean Lumber Co. Mr. Dillman says Mr. Merchant used the words "new boss of Dean Company," and Mr. Bernitt (p. 166 T.) said, "Let me introduce you to your partner Mr. Bernitt."

As to what the books of Dean Lumber Co. may have shown, there is no testimony. Although Mr. Dillman says (p. 465 Trans.) they did not show Bernitt and Wittick had any claim, yet he says all of the books of Dean Lumber Co. were destroyed by the fire in San Francisco in 1906. This latter statement is somewhat peculiar. According to the witness the books of this, a going concern, saw mill and lumber business operated on Coos Bay in Coos County, Oregon, were kept in San Francisco, Calif. According to

the testimony of W. F. Squire he had charge of and kept the books up till some time in 1905, in Coos County, Oregon, as the Company's book-keeper, that the books kept by him for Dean Lumber Company were turned over to its succesor, C. A. Smith, and he did not know what became of them, but part were sent to Mr. Dillman when the business was closed up (p. 275 Trans.) The business was evidently closed in 1907. Mr. Squire fixes the time in January, Mr. C. A. Smith, in February. These are both witnesses for appellants. Mr. Dillman further testified that all other books were destroyed by the witness in 1910 (p. 465 Trans.)

This suit was instituted in November 1909 (p. 17 Trans.)

Appellants insist there is nothing in the record to show that Dean Lumber Company did not account to appellees for part of the purchase price. If such a state of facts existed that was a matter of defense which the appellees should not be and are not required to anticipate. However that may be, appellants introduced the testimony of the President of the Dean Lumber Co., Mr. Dillman, and his denial of the interest claimed by appellees, certainly negatives any assumption of payment.

The statement that the whole title to

the land was conveyed to Smith, not merely the interest of E. B. Dean & Co., is not supported by the evidence. The conveyance is not introduced.

IV

The writer of appellants' brief is grossly in error at page 45 thereof relating to Mr. Bernitt's inquiry concerning the whereabouts of the old books of E. B. Dean & Co. The inquiry was evidently made after the beginning of this suit. However, Bernitt says (p. 166 Trans.) that Squire told him the books were shipped to California, experted and destroyed.

Mr. Squire testifies (p. 275 Trans.) that some of the books were shipped to Mr. Dillman after the sale to Smith, part of them turned over to Mr. Smith. This could not have been earlier than 1907. These were the books referred to, because the other books are introduced in evidence (testimony John C. Merchant, p. 130 Trans.) Again the transcript is not a verbatim copy of the testimony, and therefore, although intended to be accurate, it is incomplete, which a comparison with the testimony on file in this suit will show, at pages 114 and 115.

Mr. Dillman's recollection of what Mr. Merchant told him is evidently very much

at fault. He is the only witness appearing in the record who testifies to there being a five year lease, or any lease, to appellees, and also that they were to keep them in repair five years at their own expense. When all the other witnesses who have testified upon the subject stated that the rafters paid half the expense and the Company paid one-half. (Bernitt, p. 142, Phelan p. 270-273, Squire p. 277, Merchant p. 301 Trans).

Appellants lay great stress upon the testimony of Dillman and others, that Dean Lumber Co. did not recognize or deal with any one else as having any ownership or interest in the booms.

The facts are, Bernitt was in possession of the boom at the time Dillman first met him (p. 166 Trans.) That Dean Lumber Co. availed itself of the skill and services of appellees and they continued in the possession of the booms and their share of its net profits the same as formerly.

Phelan's testimony as to what Merchant told him is heresay, and was duly objected to on that ground.

The value of and conflicts in the testimony of the witness Kruger has already been discussed.

Instead of Bernitt testifying expressly that Mereen refused to recognize appel-

lees' claims as stated in appellants' brief, he says Mereen said with respect to their ownership that it was no way to have it, the Smith interests should have it all or none (p. 150 Trans.) Is not that expanding the elastic a little strong?

Laying aside, however, the references made by appellants to certain portions of the sayings of different witnesses, for the purpose evidently of questioning recognition of appellees' claims by appellants or Dean Lumber Co. The fact remains that appellees continued in the possession, operation and management of the booms after Dean Lumber Co. acquired its interest, enjoying its profits and sharing with that company the expenses of its maintenance, just the same as formerly for a period of about four years.

Although Mr. Squire did not remember that the question of ownership of the booms was ever discussed with Bernitt, (p. 280, 282, 283 Trans.) he admits Bernit told him the rafters built the booms originally and they were to have exclusive use of them.

Also, with respect to the Smith companies, regardless of the fact that Powers knew of appellees' claims in the summer of 1907 (p. 148 Trans.) and Mereen knew of them in the summer of 1907 (pp. 334-335 Trans.) and the admission in their

answer at paragraph XI, p. 56 Trans. that they knew of appellees' claims in October, 1907, Mr. Powers allowed appellees to have possession and control of the booms and enjoy their profits for the rafting season beginning in the fall of 1907 and ending in the spring of 1908, just the same as formerly (p. 354 Trans).

V

As to the date of the ouster. There is no question but the testimony is not all in harmony on that point. Appellants seek to set the time as the Spring or Fall of 1908.

The testimony establishes the fact that during the rafting season in the fall of 1908 and spring of 1909, appellees continued to catch logs in the booms, make up rafts therein and tow them to the mills as formerly (Bernitt, pp. 152, 162 to 165, 225, 226, 442, 443 Trans., Wittick, pp. 176 to 178 Trans., Exhibit H, p. 362 Trans., Powers, pp. 365, 382, 459, 460 Trans., Exhibit 27, p. 227 Trans., Exhibit 15 p. 194).

The complaint alleges that since the . . day of June 1909 Smith-Powers Logging Co. has taken exclusive possession of said booms and prevented appellees from using the same or any portion thereof. The Answer does not deny this. Therefore

the date is admitted by the pleadings. The exact time, however, is not material in view of the fact that appellees continued in joint possession of the booms for the rafting season during the latter part of 1908 and fore part of 1909.

VI

Under this Point, appellants wish to require appellees to contribute several thousand dollars toward the improvements made upon the booms, without their consent, and after deducting that amount from the $1000.00 allowed appellees, also retain the booms.

If that is appellants' idea of equity, it explains why appellees must seek a court of equity for relief.

Yet, to answer this from appellants' point of view, how is it possible for a Court to determine the amount appellees should contribute? The only evidence before the Court is Exhibit "C" (pp. 305 to 317 Trans.) covering a period of time from Sept. 20, 1907 to long after Jan. 1st, 1910, and showing a total expenditure of over $31,450.00. The items are described in such a manner that no court could segregate them, and even if it could, would it be just to make them contribute hundreds of dollars for improvements and then allow them to be confiscated at the whim of

appellants. Undoubtedly the Court made a liberal allowance for all of this in fixing the value of appellees interest in the booms as low as $1000.00.

The testimony shows that the original cost of these improvements was not less than $7500.00 (p. 167 Trans.) It is true some of the testimony would tend to show they were showing age in places. Yet it seemed to fill the bill until appellants desired to appropriate them. Four or five hundred dollars were spent on them every year prior to that time (p. 156 Trans.) and they were used each year.

Appellants also introduced, over appellees' objection, Exhibit "D" (pp. 319 320, 321 Trans.) which they possibly may insist would be sufficient for the Court to act upon in determining such an amount.

In that statement for the year 1907-1908 the total expense was $1350.47 of which one item, $644.20, was for interest alone.

There is no evidence to explain it. Why was it necessary for appellees to pay interest? Their shares in the booms were not in debt. The same objection applies to that part of it covering 1909, and further that it covers the whole of that year when it should not go beyond June 1909.

If appellants were entitled to any credit upon that account, they should have

played fair. They have repeatedly refused to furnish a statement of the expenditures to appellees, (p. 161 Trans.) and failed to introduce one in testimony showing the items of expenditure necessary to keep the booms in repair. Therefore, even if their contention was correct, in theory, by their line of conduct they have placed themselves in a position where they are not entitled to any consideration upon that point. But there is no question but the Court made due allowance for this in fixing the price at $1,000.00.

LEGALITY OF BOOMS

This testimony shows that these booms were constructed between the years 1881 and 1887 (pp. 135-139 Trans.) This was prior to any legislation making their construction illegal. So far as these appellees and their predecessors are concerned, their rights became vested upon the completion of their portion of the agreement, that is by their contribution to the construction of one-half of the booms. If any portion of these booms were so constructed subsequent to the law, that is a question for the owners of the booms and boom rights to settle with the government of the United States.

The authorities cited by the appellants

have no bearing upon this case. That the appellees could not acquire any rights in the lands under this agreement because some parts of the boom might be illegally constructed is manifestly absurd. Yet though such a rule could be made to apply, these rights became vested long prior to the enactment of any law making the construction of booms illegal.

Appellants cite the rule given in Cyc to the effect that there can be no prescriptive right to maintain or continue a material obstruction to navigation.

Appellees are not claiming that they acquired any rights by prescription. Their claim is based on contract, and the point in question is as to their right to maintain and operate the booms upon the lands of the appellants in accordance with the original agreement under which they built the booms.

PROCURING GOVERNMENT PERMITS

It seems from the evidence that C. A. Smith and the Smith-Powers Logging Company have procured permits from the Government for the maintenance, construction and operation of booms upon the lands in the complaint mentioned, and other lands. By reason of this they

sought to overcome the appellees' claim of right to use the property. That, however, does not avail them, because

> "One tenant in common will not be permitted to inequitably acquire title to the common property, solely for his own benefit or to the exclusion of his co-tenants."
>
> "The general rule being that the purchase or extinguishment of an outstanding title to encumbrance upon, or claim against the common property by one tenant in common inures to the benefit of all the co-owners who may within a reasonable time elect to avail themselves of the purchase of the outstanding interest or conflicting claim, or removal of the encumbrance from the common property."
>
> 38 CYC 40, 41-42

Crawford vs. O'Connell, 39 Or. 153, 64 Pac. 656.

Dray vs. Dray, 21 Ore. 59, 27 Pac. 223.

Also see

Bohlman vs. Coffin, 4th Or. 317.

IN CONCLUSION

The main question in this case is whether Smith had notice or was bound to take notice of appellees' claims at the time of the purchase.

Appellees were in actual possession at the time the transfer took place, February 1907 (Smith, pp. 219 and 222 Trans., Bernitt pp. 146 & 449 Trans).

Smith did not examine the boom nor have it examined to see if it was in the possession of anyone (p. 223 Trans). And he and appellants would have the Court believe that he knew nothing of appellees, when the established facts are that they were not only in possession of the booms, but sharing with him as successor of Dean Lumber Co., its earnings. In addition to this, the book accounts covering these booms were evidently examined by him or his agents. Squire testifies that the books were turned over to Smith (p. 275 Trans.)

The appellees claimed the right of one-half of all boomage earned by the booms up to such time as an accounting was made. The Court allowed them upon what it could determine was the earnings up to the end of the 1908-1909 logging season, sometime about June 1st, 1909.

Exhibit 15 gives the exact feetage on

the Simpson Lumber Co. logs, Exhibit 27, the feetage of the Gould logs. And as to the other logs the amount is given in Bernitt's testimony on page 231 of the transcript, and at other pages therein. These amounts are not controverted but stand proven. Apparently the only contention of appellant is that appellees were not entitled to any amount. This is the evidence which the Court accepted as establishing the amount of timber on which appellees should recover.

With reference to the identification of the account books, Exhibits 1 to 7 inclusive, and 18 to 23 inclusive, the witness W. T. Merchant identifies these as the books of E. B. Dean & Co. at the time each is offered in evidence and states that the bookkeepers who made the entries are dead (p. 124 Trans.) He identifies some of the entries in the books to be in the handwriting of his father (p. 130 Trans.) C. H. Merchant, one of the partners of E. B. Dean & Co. which consisted of E. B. Dean, David Wilcox and C. H. Merchant (pp. 116, 117, 120 Trans).

The persons who acted as book-keepers and kept these books were: C. H. Merchant (p. 116,) Webster (p. 119 Trans.), F. M. Phipps (p. 120 Trans.), Sam Dean (p. 125), Mr. Bischoff (p. 127). Witnesses identified their writing (pp. 117, 119,

129, 120, 127, 130, 204 Trans). W. T. Merchant (p. 129, 204 to 215 Inc.) also again identifies the books.

The witness John C. Merchant identifies the books Exhibit 1 to 7 inclusive, as the account books of E. B. Dean & Co., and states they were in the back office of E. B. Dean & Company during the time his father, C. H. Merchant, was receiver (p. 130) and stated that he worked for his father while he was Receiver for E. B. Dean & Co. and had occasion to look over the books a number of times. That he had secured the books from the old warehouse of E. B. Dean & Company, three years prior to his testifying.

The appellees believe that the law, equities and evidence in this case fully sustain the decree against appellants.

Respectfully submitted,
W. U. DOUGLAS,
JOHN F. HALL,
Attorneys for Appellees.